

1 **PROCEEDINGS OF A MILITARY COMMISSION**

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3 The military judge called the R.M.C. 803 session to order at

4 Guantanamo Bay, Cuba, at 1515 hours, 04 June 2007, pursuant to the

5 following order:

6

7 Military Commissions Convening Order Number 07-04, Department of

8 Defense, Office of Military Commissions, Office of the Convening

9 Authority, Washington D.C., dated 1 May 2007.

10 **[END OF PAGE]**

1 MJ: This court is called to order.

2 Prosecutor, would you give the jurisdictional status or
3 documents referring to the Military Commission, please.

4 PROS: Yes, sir. Good afternoon, Your Honor.

5 MJ: Good afternoon.

6 PROS: This Military Commission is appointed by Convening Order
7 Number 07-04, dated the 1st of May 2007, copies of which have been
8 furnished to the military judge, counsel, and the accused and which
9 have been marked as Appellate Exhibit 002 and attached to the record.
10 There are no corrections to the convening order. The charges have
11 been marked as Exhibit 001--correct that, Appellate Exhibit 001 and
12 have been properly approved by the Convening Authority and referred
13 to this commission for trial.

14 The prosecution caused a copy of the charges to be served
15 on the accused on the 14th of May, 2007. The prosecution is ready to
16 proceed in the arraignment of the *United States versus Salim Ahmed*
17 *Hamdan, also known as Salim Ahmad Hamdan, and Salem Ahmed Salem*
18 *Hamdan, and Saqr al Jaddawy, and Saqr al Jaddawi, and Khalid al*
19 *Jadawwi, and Khalid bin Abdalla, and Khalid wi'd Abdallah.*

20 I'm trying to speak slowly, Your Honor, because of the
21 interpreter.

22 MJ: I appreciate that, thank you.

23

1 PROS: The accused and the following personnel detailed to this
2 commission are present.

3 **CAPTAIN KEITH J. ALLRED, JAG CORPS,**

4 **UNITED STATES NAVY, MILITARY JUDGE;**

5 **MYSELF, LIEUTENANT COLONEL WILLIAM B. BRITT, PROSECUTOR;**

6 **LIEUTENANT COMMANDER TIMOTHY STONE, ASSISTANT PROSECUTOR;**

7 **LIEUTENANT CLAYTON TRIVETT, ASSISTANT PROSECUTOR;**

8 Your Honor excused him 2 days ago, I believe.

9 **LIEUTENANT COMMANDER CHARLES D. SWIFT,**

10 **DETAILED DEFENSE COUNSEL;**

11 **MS. ANDREA J. PRASOW, ASSISTANT DETAILED DEFENSE COUNSEL;**

12 **CHARLES C. SIPOS, CIVILIAN DEFENSE COUNSEL;**

13 **JOSEPH M. MCMILLAN, CIVILIAN DEFENSE COUNSEL;**

14 And the members are currently absent.

15 Master Sergeant [REDACTED] has been been detailed
16 reporter for this commission, and has been previously sworn.

17 MJ: Very well. Thank you. I've been detailed to this case by
18 the Chief Judge of the Military Commission Trial Judiciary. My
19 designation is marked as Appellate Exhibit 4. I have been sworn in
20 accordance with R.M.C. 807 and certified and qualified in accordance
21 with Article 26 of the Uniform Code of Military Justice.

22 Trial Counsel, would you announce your detailing authority
23 and qualifications?

1 PROS: Yes, sir. All members of the prosecution have been
2 detailed to this Military Commission by the Chief Prosecutor. All
3 members of the prosecution are qualified under R.M.C. 503 and we have
4 previously been sworn in accordance with R.M.C. 807. No member of
5 the prosecution has acted in any manner which might tend to
6 disqualify us in this proceeding and the detailing document is marked
7 previously and has been filed as Appellate Exhibit 006. We have no
8 additional parties who will be sitting at the table for us.

9 MJ: Very well. Thank you very much, Colonel.

10 Commander Swift, would you announce your status and
11 qualifications?

12 DDC: Yes, Your Honor. Good afternoon, sir.

13 I have been detailed to his Military Commission by the
14 Chief Defense Counsel. I am qualified under Rule for Military
15 Commission 503 and have previously been sworn in accordance with Rule
16 for Military Commission 807. I have not acted in any manner that
17 might tend to disqualify me in this proceeding. The document
18 detailing counsel is marked as Appellate Exhibit 007.

19 MJ: Thank you. Ms. Prasow,--will you speak for your assistant?

20 DDC: No, no, Your Honor.

21 ADDC: Good afternoon, Your Honor. I have been detailed to the
22 military--this Military Commission by the Chief Defense Counsel. I
23 am qualified under R.M.C. 503 and I have previously been sworn in

1 accordance with R.M.C. 807. I have not acted in any manner that
2 might tend to disqualify me in this proceeding. The document
3 detailing me as counsel is marked as Appellate Exhibit 007.

4 MJ: Thank you, very much.

5 CDC1: Afternoon, Your Honor. I'm Charles Sipos. I am licensed
6 to practice in the state of Washington. I am qualified in accordance
7 with R.M.C. 502(d) and I have a provided my notice of appearance and
8 agreement to the military judge and it is marked as Appellate Exhibit
9 012 as required by the Military Commissions Act. I have not acted in
10 any manner that might tend to disqualify me in this proceeding, and I
11 have been previously sworn in accordance with R.M.C. 807.

12 MJ: Thank you.

13 Sir?

14 CDC2: Good afternoon, Your Honor. My name is Joseph McMillan.
15 I am licensed to practice in the state of Washington. I'm qualified
16 in accordance with Rule of Military Commission 502(d) and I have
17 provided my notice of appearance and agreement to the military judge
18 and it is marked as Appellate Exhibit 012 as required by the Military
19 Commissions Act. I have not acted in any manner that might tend to
20 disqualify me in this proceeding. I've been previously sworn in
21 accordance with Rule for Military Commission 807.

22 MJ: Very well. Thank you very much.

23 Colonel, would you introduce the Commission translator?

1 PROS: Your Honor, at this time I have received a request from
2 the translator that her identity not be identified, however, I know
3 she has been previously sworn and is present in court today.

4 MJ: Very well. I understand that a copy of her curriculum
5 vitae has been provided to the court reporter and marked as Appellate
6 Exhibit 15.

7 PROS: That is correct, Your Honor.

8 DDC: The defense has no objection to her not been identified
9 and has received a copy of the curriculum vitae.

10 MJ: Thank you, Commander.

11 Before we continue preliminary matters I'd like to speak to
12 Mr. Hamdan. Mr. Hamdan, are you able to understand and speak
13 English?

14 ACC: **[No response.]**

15 MJ: The gentleman sitting beside you, are you the interpreter,
16 sir, for Mr. Hamdan?

17 DEFENSE INTERPRETER: Yes.

18 MJ: Did he answer the question to you in the Arabic language?

19 DEFENSE INTERPRETER: Yes.

20 MJ: Okay, and what was his answer about speaking English?

21 DEFENSE INTERPRETER: No, no, he does not speak English.

22 MJ: He does not speak English. It sounds like he will desire
23 then and need the services of an interpreter to understand the

1 proceedings. Is that right?

2 ACC: Yes.

3 MJ: Very well. Now I see that you're listening through a
4 headset to the interpreter who is behind me in the interpretation
5 booth. I know there are various dialects of the Arabic language and
6 I would like to ask if you understand the dialect that she is
7 speaking?

8 DEFENSE INTERPRETER: He understands.

9 MJ: Very well. The interpreter's sitting beside you, sir, I
10 don't know your name. May I ask your name?

11 DEFENSE INTERPRETER: Your Honor, my name is [REDACTED].

12 MJ: [REDACTED]. That sounds like a German name. Very
13 good, very good.

14 DEFENSE INTERPRETER: In its origin, yes.

15 MJ: Do you speak the Arabic language----

16 DEFENSE INTERPRETER: I do.

17 MJ: ----in the dialect that Mr. Hamdan----

18 DEFENSE INTERPRETER: Yeah, I do. Yemeni Arabic, yes.

19 MJ: Yemeni Arabic. Do you feel that you are qualified then to
20 serve as an interpreter for Mr. Hamdan in these proceedings?

21 DEFENSE INTERPRETER: I do.

22 MJ: To the extent he doesn't rely upon the interpretation
23 provided by the court interpreter?

1 DEFENSE INTERPRETER: I do.

2 MJ: Very well. Have you been sworn to perform your duties as
3 an interpreter in the past?

4 DEFENSE INTERPRETER: I have, yes.

5 MJ: Very well. Is the government satisfied with the
6 qualifications and [REDACTED]?

7 PROS: Yes we are, certainly, based on his reputation
8 representation.

9 MJ: Very good. [REDACTED] is it fair for me to understand
10 then that you have been essentially a member of the defense team and
11 interpreting for the accused on an ongoing basis, or are you just
12 interpreting today?

13 DEFENSE INTERPRETER: Yeah, I have, since January 04, yes.

14 MJ: Very good. Thank you very much.

15 Mr. Hamdan, pursuant to the Military Commissions Act you
16 are entitled to the representation and you are being represented by
17 Lieutenant Commander Charles Swift, your detailed defense counsel,
18 and Ms. Andrea Prasow, who is an assistant detailed defense counsel.
19 You may also request a different military lawyer to represent you.
20 If the person you request is reasonably available, he or she would be
21 appointed to represent you and your detailed--or as your detailed
22 defense counsel I should say. If you are represented by detailed
23 defense counsel of your own selection, in other words if you ask for

1 a different military lawyer, you would normally lose the services of
2 your current detailed counsel, Lieutenant Commander Swift. You may,
3 however, request that Lieutenant Commander Swift remain on your case
4 and that the Chief Defense Counsel in his sole discretion grant you
5 another military attorney.

6 Do you understand these rights?

7 ACC: Yes.

8 MJ: Very well. The services of Commander Swift and Ms. Prasow
9 are provided to you free of charge.

10 Do you understand that?

11 ACC: Yes.

12 MJ: In addition to these detailed defense counsel, you may be
13 represented by a qualified civilian lawyer. A civilian lawyer would
14 represent you at no expense to the government. To be qualified, a
15 civilian attorney must be a US citizen; must be admitted to the
16 practice of law in a state, district, territory, or possession of the
17 United States or a federal court, and may not have been the subject
18 of disqualifying actions by a bar or other competent authority; must
19 be eligible for a secret clearance or higher as required; and must
20 agree in writing to comply with the orders, rules, and directions of
21 these Military Commissions.

22 If a civilian lawyer represents you, your detailed counsel,
23 Lieutenant Commander Swift, would serve as associate counsel unless

1 you specifically waive the right to be represented by Lieutenant
2 Commander Swift, your detailed defense counsel.

3 Do you understand this?

4 ACC: Yes.

5 MJ: Do you have any questions about your rights to counsel in
6 this Military Commission?

7 DEFENSE INTERPRETER: He would like Commander Swift to be the
8 lead counsel for him.

9 MJ: Is it fair--do I understand you to be saying that you have
10 no questions about your rights to counsel?

11 DEFENSE INTERPRETER: He has no questions.

12 MJ: Very good. You are satisfied then with Lieutenant
13 Commander Swift as your detailed defense counsel and with the other
14 three attorneys who are currently sitting with you at the defense
15 table?

16 ACC: Yes.

17 MJ: Very well. Do you want any other qualified counsel to
18 represent you in this case?

19 ACC: I understand that Harry Schneider from Perkins Coie will
20 represent me in the future.

21 MJ: Very well. I understand that as well, and as a matter of
22 fact while we're at that point I should indicate that I met yesterday
23 evening with the parties for both sides and we discussed some of

1 these matters in an R.M.C. 802 conference. Each of the members of
2 the defense team has a slightly different history. Lieutenant
3 Commander Swift will soon be retiring from the Navy and indicated to
4 the court that he anticipates being able to continue to represent you
5 as a retired person, as a civilian. Mr. Sipos is making a limited
6 appearance today only. Maybe I should ask you, Commander Swift, did
7 you discuss this issue with Mr. Hamdan this morning?

8 DDC: I did, Your Honor. He understands that Mr. Sipos is
9 making a limited appearance. He also understood and indicated to me
10 that I would be retiring and that he desired me to continue as a
11 civilian, and he understood that that would be at no expense to the
12 government and I indicated that I would offer my services at that
13 time pro bono. And he indicated that he wanted me to continue to
14 serve as lead counsel which he again indicated to the court.

15 MJ: Very well. Okay so we have starting from the left Ms.
16 Prasow will be here until the case is complete, it appears. Mr.
17 Sipos for today only and then withdraw to take up another position.
18 Mr. McMillan for the duration. Lieutenant Commander Swift on active
19 duty until retirement and then as a civilian. And not here today but
20 soon to arrive Mr. Schneider.

21 DDC: That's correct, Your Honor.

22 MJ: And was there another attorney? Rebecca Engrave. Is she
23 going to appear?

1 DDC: Well she is in the process of qualifying for the civilian
2 pool. Until she qualifies having done the security clearance work,
3 it didn't seem appropriate to put her on the record. Mr. Schneider
4 has finished the qualification and we expect him to be on the record
5 very shortly.

6 MJ: Well I appreciate that.

7 Mr. Hamdan, I gather you're satisfied then to be
8 represented by this team of attorneys for today their future plans as
9 we've discussed.

10 Is that correct?

11 ACC: Yes.

12 MJ: Very well. Another issue we discussed in our 802
13 conference was the existence of a Appendix B or Attachment B to the
14 defense motion which is classified Secret. I raised with the parties
15 the possibility of a stipulation in lieu of admitting that exhibit.

16 Where are we Colonel Britt, I should ask perhaps?

17 PROS: Yes, sir. After discussing the matter with the defense,
18 we are unable to reach a stipulation in that matter.

19 MJ: Okay. So we'll receive Attachment B and it will be
20 separated from the other exhibits in the record of trial and retain
21 its classified status. I'll consider that apparently on the motion
22 I'm judging from the government.

1 We discussed the existence of some protective orders that
2 were issued in years past and there was some debate about their
3 continued vitality. Defense, perhaps Mr. McMillan, expressed that
4 there were some objections to them and some desire to renegotiate or
5 rewrite them. Commander Swift, or Colonel Britt, would you like to
6 tell me the status of these protective orders after your
7 negotiations?

8 PROS: Your Honor, unfortunately, once again I met with the
9 defense. We discussed the protective orders in some detail. The
10 defense has some reservation about the contents and as to stipulating
11 to the continued effectiveness. What we'd like to do is to submit
12 those to you. The government will argue that you need to ratify
13 those, continue those in effect; and the defense will make their
14 argument opposing them, I'm sure, at the same time.

15 DDC: Your Honor, as discussed, our only concerns were in two
16 parts. One dealt with a provision of the "For Official Use Only"
17 designation as being protected. Our motion actually the A part of
18 the appendix is For Official Use Only. That's a term that comes from
19 the Privacy Act and I don't believe that it's appropriate to the
20 protective order. We're absolutely willing to remain bound as far as
21 classified information which is of course protected under multiple
22 different sources of law, as far as for law enforcement purposes only
23 we understand that that is not to be distributed outside of the

1 limitations set under the protective order when it was given and we
2 agreed to that and not to publish it in any other event means other
3 than to members of the defense team or to this court or others as
4 necessary. With the rest--beyond that we weren't really willing to
5 go--we don't hold that they're in place, but beyond those two places
6 it's more future uses and those orders come from the past. As far as
7 the past and our current uses, were willing to stay there, but for
8 future uses we weren't willing to stipulate to that at this point.

9 MJ: Okay. So what I think I hear the parties to be saying is
10 that they will be bound for the present by the protective orders as
11 written and that they desire to have them modified for the future.

12 DDC: That's not exactly correct, Your Honor. We're willing to
13 be bound to the parts of the protective order that has to do with law
14 enforcement and has to do with classified. The For Official Use Only
15 designation being bound, we have an objection to that purpose as
16 being bound today, otherwise--one of our documents is For Official
17 Use Only. We find ourselves in a difficulty.

18 MJ: Okay. So what's the government's position? This is
19 attachment D and E perhaps to the motion.

20 PROS: Your Honor, I think the position that we find ourselves
21 in now is essentially a product of our failure to be able to sit down
22 with the defense and have adequate time to discuss these matters.
23 We're talking about four, maybe five protective orders that we argue

1 are currently in place and serve in effect as an interim protective
2 order until such time as we can sit down with the defense and go over
3 these matters.

4 Lieutenant Commander Swift stated that there are certain
5 issues involving the FOUO designation. There is a lot more in those
6 protective orders that I think we need to address, we need to go
7 through, we need to check their validity in light of the current law
8 because we're talking about orders that were introduced 3, 4 years
9 ago. So what the government is essentially requesting that these
10 documents constitute an interim order until such time as we have time
11 to sit down and iron these issues out. I don't think we can do that
12 during this session while we're here addressing these other important
13 matters.

14 MJ: Commander Swift, are you concerned that you won't be able
15 to make your argument with respect to the motion if this FOUO
16 document is protected by the protective order?

17 DDC: My concern becomes, Your Honor, to saying on one hand that
18 the motion is in place and then For Official Use Only document would
19 not under those terms be part of a public record and I would be
20 stipulating to that for the purposes of this motion as I understand
21 it. If I say, "that's in place," and that document's marked For
22 Official Use Only, but it's not part of the public record which I
23 don't agree to. So, however we want to handle that; again, law

1 enforcement sensitive and classified material absolutely in part of
2 that. Beyond that I don't know that I have anything that they would
3 be concerned about.

4 MJ: Okay. Well, do I have any motion or am I just going to
5 have to figure out what to do here?

6 PROS: Well I think we've got two documents at issue. At least
7 from the attachments to the defense's motion. The first is a
8 classified document and obviously that's going to maintain its
9 character unless we reach some type of stipulation which we've been
10 unable to do. The second document, my understanding is the agreed
11 upon CSRT documents--and once again, please correct me if I'm wrong--
12 and we have agreed and stipulated that those can be introduced in
13 their current fashion for purposes of this hearing. So I'm not
14 really sure----

15 MJ: You've agreed that they could be introduced as part of the
16 public record?

17 PROS: Yes, sir.

18 MJ: That's what the defense seems to want. Is that what you're
19 looking for, Commander?

20 DDC: Yes, Your Honor.

21 MJ: In other words they'll be treated as unclassified today
22 even though they are marked "For Official Use Only"?

23 DDC: Yes, sir.

1 MJ: Does that satisfy your concern?

2 DDC: It does, Your Honor.

3 MJ: Well I will then reinforce these protective orders which
4 have been marked as Appellate Exhibits 16, 17, 18, 19, and 20, and
5 order the parties to comply with them as an interim measure until you
6 can make your objections known to the government, either reach an
7 accommodation, or file a motion with the court which allows me to
8 direct the government to do something otherwise. That is with the
9 understanding that the document attached to defense exhibit 1 [sic],
10 the motion to dismiss, can be treated as unclassified and part of the
11 public record for purposes of this motion. Okay?

12 DDC: Thank you, Your Honor.

13 MJ: Let's see, I guess that in my mind strikes me as all the
14 significant discussions we had yesterday in our 802 conference.
15 Would either side like to remind me of something they think needs to
16 be placed on the record or supplement my memory?

17 PROS: No, Your Honor. Nothing from the government.

18 DDC: No, sir. That covers it.

19 MJ: Okay. The defense suggested that there might be some
20 additional motions to be presented today. Are those ready to file or
21 not?

22 DDC: They're not ready to file today, sir.

23 MJ: Okay, we can receive those then when they are ready to

1 file. If counsel are satisfied then with my summary of the 802
2 conference, I will accept Mr. Hamdan's designation of Lieutenant
3 Commander Swift as the attorney that I should turn to first for
4 argument on behalf of the defense team if there is any disagreement
5 among the attorneys.

6 I didn't actually ask a question, but Mr. Hamdan, I
7 understand you to be telling me that if your members of the defense
8 team disagree, you would like me to turn to Lieutenant Commander
9 Swift to speak on behalf of your defense team. Is that your desire?
10 Do you understand the question that I am asking him?

11 DEFENSE INTERPRETER: He would like the question repeated.

12 MJ: Maybe I'm making it too complex. You have four attorneys.
13 There may be occasion when they have different feelings about how the
14 case should proceed, different advice they would give you. Is it
15 your desire that I consider Lieutenant Commander Swift your lead
16 attorney, the one who will speak on behalf of the defense team?

17 ACC: Yes.

18 MJ: Very good. Do counsel understand and agree with that
19 selection?

20 DDC: We do, Your Honor.

21 MJ: I see all members of the defense team--all the other
22 members of the defense team seem to be smiling in accord as well.

23 I previously provided counsel with a brief biography of

1 myself and invited counsel to submit voir dire questions in writing.
2 The government had no questions for the court. The defense filed
3 some which the court answered in writing. Does the defense have any
4 follow-up questions based on my responses to your previously
5 submitted questions?

6 DDC: A couple, sir.

7 MJ: Please.

8 DDC: In response to the question 4, you indicated that you had
9 not written or lectured directly on Guantánamo Bay, but you'd also
10 indicated that you had given lectures on the law of armed conflict
11 and specifically the treatment of detainees and prisoners of war and
12 that was while you are in Europe to an international audience. Did
13 during the course of those lectures Guantánamo Bay come up as a
14 subject either in questions or something addressed in any slide?

15 MJ: I'm sure it did. The United States was criticized in those
16 lectures, I received some of that criticism from the international
17 audience, and the issue was very much in the news at that time, and
18 so, yes, I'm sure the fact that we were detaining people and
19 preparing for these commissions was part of the discussion.

20 DDC: In recollecting your answers at the time and understanding
21 that there's an international audience for these commissions, was
22 there anything in your answers or positions that should one of those
23 officers that attended it in Europe learn of that you are a judge

1 here would cause them to be concerned or to view the tribunal as not
2 actually impartial to the best of your knowledge?

3 MJ: I don't think so. I don't think so.

4 DDC: Were your answers given at the time as your personal
5 positions or that what you understood the positions to be of the
6 United States at that time?

7 MJ: In large part I was telling them what the United States'
8 position was.

9 DDC: And that may or may not have agreed with your personal
10 beliefs at the time?

11 MJ: Exactly. Exactly.

12 DDC: You will of course apply your independent analysis here,
13 sir?

14 MJ: Absolutely.

15 DDC: Thank you, sir. We have no questions and no challenge --
16 no further questions and no challenge.

17 MJ: Very good. Any challenges from the government?

18 PROS: None for the government. No challenges, Your Honor.
19 Thank you.

20 MJ: Thank you, very much. Let's see, in light of the absence
21 of a challenge I believe I'm qualified then to serve as the military
22 judge in this commission. Do counsel for both sides understand the
23 provisions of the Manual for Military Commissions concerning

1 safeguarding and securing classified information?

2 PROS: Yes, sir. The government does.

3 DDC: The defense understands, sir.

4 MJ: Very good. Do you understand that you must as soon as
5 practical notify me of any intent to offer evidence involving
6 classified information so that I may consider the need to close these
7 proceedings?

8 PROS: Yes, sir, we do.

9 DDC: We do, sir.

10 MJ: As I am required by the Manual for Military Commissions to
11 consider the safety of witnesses and others at these proceedings, do
12 counsel for both sides understand that they must notify me of any
13 issues regarding the safety of potential witnesses, so that I may
14 determine the appropriate ways in which testimony will be received
15 and witnesses protected?

16 PROS: Yes, we do, sir, for the government.

17 DDC: The defense does, sir.

18 MJ: Very good. We've covered the issue of protective orders.
19 They have been reissued, you might say, as interim orders and marked
20 as Appellate Exhibits 16, 17, 18, 19, and 20, pending either some
21 agreement between the parties with respect to the matters that are in
22 dispute or a motion from the defense if we need to have a court
23 compel some concession by the government. Is that a fair

1 understanding of where we are?

2 PROS: It is, Your Honor.

3 MJ: Commander Swift?

4 DDC: It is, Your Honor.

5 MJ: Thank you. Are counsel aware of any other protective
6 orders other than these five that have been marked and attached as
7 appellate exhibits?

8 PROS: No, sir. No other written orders, nor are we aware of
9 any oral orders.

10 DDC: Neither is the defense, sir.

11 MJ: Very good. The current filings inventory is marked as
12 Appellate Exhibit 14. Do counsel for both sides agree that it is an
13 accurate reflection of the filings motions, responses, replies and
14 requests for relief filed to date?

15 PROS: Yes, sir, it is.

16 MJ: Commander Swift?

17 DDC: We agree, sir.

18 MJ: Okay. The accused will now be arraigned.

19 All personnel appear to have the requisite qualifications
20 and all personnel required to be sworn have been sworn. Commander
21 Swift, have you and the accused previously been provided a copy of
22 the charges?

23 DDC: We have, sir.

1 MJ: All parties to the trial have been furnished with a copy of
2 the charges. The prosecutor will announce the general nature of the
3 charges.

4 PROS: Yes, Your Honor. Prior to announcing the general nature
5 of the charges I would also state in my place that the accused has
6 additionally been furnished with a copy of those charges translated
7 into Arabic which I believe the rules require.

8 MJ: That's good to know.

9 DDC: We agree with that, sir.

10 MJ: Thank you.

11 PROS: The general nature of the charges in this case are one
12 charge, two specifications of conspiracy in violation of 10 United
13 States Code section 950(v)(b)(28) and one charge, eight
14 specifications of providing material support for terrorism in
15 violation of 10 USC section 950(v)(b)(25).

16 MJ: Thank you very much. Does the accused desire that the
17 charges and specifications be read?

18 DDC: We waive the reading of the charges and specifications. I
19 have gone over them in detail with the accused.

20 MJ: Very good, thank you. The prosecutor may save his voice
21 for another occasion.

22 PROS: Thank you, sir.

23 **[THE CHARGE SHEET FOLLOWS AND IS NOT A NUMBERED PAGE.]**

1 MJ: Accused and Counsel, please rise.

2 **[The accused and his defense counsel did as directed.]**

3 MJ: Salim Ahmed Hamdan, I now ask you how do you plead to the
4 charges before the court? But I advise you that any motion addressed
5 under R.M.C. 905b must be made prior to entry of pleas.

6 Commander Swift?

7 DDC: The defense has one motion already on file with this court
8 which we would like to argue at this time and reserve pleas and
9 further motions pending the conclusion of that motion, Your Honor.

10 MJ: Very well. You may be seated.

11 **[The accused and his defense counsel resumed their seats.]**

12 MJ: The court has in fact received a motion from the defense.
13 It has been marked as Appellate Exhibit 008 which asks the court to
14 dismiss the charges and specifications on the basis of an absence of
15 jurisdiction over the accused. The government's response has been
16 received and marked as Appellate Exhibit 10. The defense reply to
17 the government response and has been received and marked as Appellate
18 Exhibit 13. Attached to the motion to dismiss are six exhibits: a,
19 b, c, d, e, and f. Does the government have any objection to the
20 court's considering those exhibits as evidence with respect to the
21 motion?

22 PROS: No, sir. Of course we do have the one classified
23 document just to mark accordingly.

1 MJ: Understanding that one is classified. Attached to the
2 government's response were two exhibits. Does the defense object to
3 the court's considering those two exhibits as evidence?

4 DDC: The defense does not, Your Honor.

5 MJ: Very well. And attached to the defense reply are two: g
6 and h. Trial counsel, any objection to the court's considering
7 attachments g and h?

8 PROS: No, sir.

9 MJ: Very good. Thank you.

10 DDC: Your Honor?

11 MJ: Yes.

12 DDC: My client indicates that it is his perception that the
13 translator is having trouble keeping up with you right now because it
14 began to garble and he would ask if you can keep it slow.

15 MJ: Thank you. I meant to take the lead on that and ask the
16 parties to speak slowly so the interpreter could keep up. Apparently
17 the Arabic language is about one and a half times as lengthy as
18 English. So we should speak at three-quarters speed or two-thirds
19 speed, perhaps. Is there any other evidence----

20 DDC: My client is in agreement with Your Honor.

21 MJ: Very good. Is there any other evidence that the defense
22 would like to offer with respect to the motion?

23 DDC: No, Your Honor.

1 MJ: Trial Counsel, do you have any other evidence to offer with
2 respect to the motion?

3 PROS: No, sir.

4 MJ: Very good. In that case I'm prepared to entertain
5 argument. Mr. McMillan I believe is arguing for the defense. Can
6 you argue at two-thirds speed?

7 CDC1: I believe so, Your Honor. Although I'm happy to be
8 admonished to slow down if I get ahead of myself for the translator.

9 MJ: I will try not to interrupt the argument, but when I see
10 Mr. Hamdan looking confused, that will be my first clue perhaps that
11 the translator is having trouble. Please go ahead.

12 CDC1: May it please the court. My name is Joseph McMillan,
13 civilian defense counsel for Salim Hamdan. Mr. Hamdan has moved for
14 dismissal of the charges referred against him based on a lack of
15 personal jurisdiction of this commission. Rule of Military
16 Commission 905(c) places the burden of persuasion on this issue on
17 the government, and the government in this instance has failed to
18 carry that burden.

19 The analysis of jurisdiction must begin with the principle
20 that as an Article 1 court and as a military court, this commission
21 is a court of strictly limited jurisdiction. In the 1902 Supreme
22 Court case *McClaghry versus Deming* which is cited in the defense
23 reply brief at footnote 3, the Supreme Court of the United States

1 emphasized the limited jurisdiction of military courts and emphasized
2 that no presumptions or inferences would be drawn in favor of the
3 jurisdiction of military tribunals.

4 The court said, and I quote, "A court-martial organized
5 under the laws of the United States is a court of special and limited
6 jurisdiction. It must appear affirmatively and unequivocally that
7 the court was legally constituted, that it had jurisdiction, and that
8 all the statutory regulations governing its proceedings had been
9 complied with. There are no presumptions in its favor so far as
10 these matters are concerned. As to these matters the rule announced
11 by Chief Justice Marshall in the case *Brown versus Keene* applies.
12 His language is as follows, 'The decisions of this court require that
13 averment of jurisdiction shall be positive, that the declaration
14 shall state expressly the fact on which jurisdiction depends. It is
15 not sufficient that jurisdiction may be inferred argumentatively from
16 its averments. The facts necessary to show their jurisdiction must
17 be stated positively and it is not enough that they may be inferred
18 argumentatively.'"

19 That principle, Your Honor, was reaffirmed as recently as
20 last year in the case *Hamdan versus Rumsfeld*. In that decision
21 Justice Stevens writing for the majority said, "It is undisputed that
22 Hamdan's commission lacks jurisdiction to try him unless the charge
23 properly sets forth not only the details of the act charged, but the

1 circumstances conferring jurisdiction." In making that statement the
2 Supreme Court of the United States was quoting the Blackstone of
3 military law, Colonel William Winthrop in his landmark treatise
4 Military Law and Precedents.

5 The charge sheet in this case fails to positively and
6 affirmatively state the facts on which jurisdiction depends.

7 MJ: Excuse me just a moment.

8 **[The military judge spoke to the bailiff.]**

9 MJ: Okay, I apologize.

10 CDC1: The charge sheet that has been referred against Mr.
11 Hamdan in this case fails to positively and expressly state the facts
12 on which jurisdiction depends. Instead, the government has been
13 remarkably vague in stating the basis for jurisdiction of this
14 commission. It is clear from the government response, however, that
15 they intend to rely on the CSRT, the Combatant Status Review Tribunal
16 finding with respect to Mr. Hamdan; at least that's the best we can
17 discern from the response as submitted.

18 Our primary argument, Your Honor, is that this CSRT finding
19 with respect to Mr. Hamdan does not satisfy the jurisdictional
20 prerequisites for this commission because the CSRT finding with
21 respect to Mr. Hamdan did not include a finding of unlawful
22 combatancy. Rather, the CSRT finding which we submitted as

1 attachment d to our motion makes a finding of "enemy combatant" with
2 no additional finding of unlawful combatantcy.

3 The government's position appears to be that the term
4 "enemy combatant" in this CSRT finding should be deemed synonymous
5 with the term "unlawful enemy combatant" in the Military Commissions
6 Act. To adopt that position would be grave error, Your Honor. To
7 adopt that position would be to ignore cardinal principles of
8 statutory construction and cardinal principles concerning the
9 jurisdiction of military courts which I read from the Supreme Court
10 case.

11 It is axiomatic that words or phrases should not be deleted
12 or ignored or disregarded in interpreting statutes. It is clear from
13 the text of the M.C.A., the Military Commissions Act, that Congress
14 inserted the word "unlawful" deliberately and repeatedly and for good
15 reason. Congress makes clear through its repeated references to
16 "unlawful combatantcy" in the jurisdictional sections of the M.C.A.
17 that it does not intend to subject lawful combatants to the
18 jurisdiction of this commission. To do so would violate the Geneva
19 Conventions and violate the law of war. The M.C.A. can and should be
20 interpreted to require a finding of unlawfulness. The CSRT does not
21 make such a finding, and for that reason the government's reliance on
22 the CSRT for the personal jurisdiction or for the jurisdiction of
23 this court is misplaced.

1 It is fundamental that in construing jurisdictional
2 statutes for Article 1 courts and for military courts those
3 jurisdictional statutes are strictly construed. No presumptions in
4 favor of jurisdiction are made. In fact, a Military Commission this
5 morning recognized the inadequacies of the jurisdictional averments
6 in similar circumstances. Judge Brownback set forth an analysis
7 which the defense in this matter believes to be precisely correct
8 with respect to jurisdiction.

9 MJ: Please skip over Judge Brownback's analysis and move to
10 your next point.

11 CDC1: The jurisdictional deficiencies of this court are
12 heightened by the existence and continuing validity of a US District
13 Court order entered in November 2004 enjoining the trial of Mr.
14 Hamdan before a Military Commission unless and until a status
15 determination has been made in compliance with the Geneva Convention.
16 The government's response to that injunction appears to be that it
17 has been superseded by intervening law, specifically the passage of
18 the M.C.A. We note, however, that it is well settled that an
19 injunction entered by a court of competent jurisdiction cannot simply
20 be ignored, but must be modified or vacated by the parties seeking
21 relief from its provisions. In this case, the government is asking
22 this court to ignore a currently existing and valid injunction of a
23 US District Court which captures indeed the spirit that we think

1 Congress intended to respect and honor in the M.C.A. by taking pains
2 to ensure that a lawful combatant not be subject to the jurisdiction
3 of a Military Commission.

4 We have set forth in our motion papers additional arguments
5 as to why the jurisdiction of this commission does not exist. Even
6 if the court were to disagree with everything that has been advanced
7 right here, there are fatal flaws in the jurisdictional provisions of
8 the M.C.A. on a constitutional level. I do not believe it necessary
9 for this court to reach those issues because of the statutory
10 argument that I have summarized here. However, I would like to
11 reserve 5 minutes on rebuttal to address those if the government sees
12 fit to raise those issues or to respond to whatever else the
13 government may have to say with respect to the statutory argument.

14 MJ: Very good. We'll accept that reservation.

15 CDC1: And I'd like to invite the court to ask any questions it
16 may have with respect to our motion papers.

17 MJ: I do have several questions. Would you prefer to take them
18 now or after hearing the government's argument?

19 CDC1: Perhaps the latter.

20 MJ: Okay, fair enough. Colonel Britt, would you like to argue
21 for the government?

22 PROS: Yes, sir, please. If I could just take a moment, I have
23 numerous materials I need to move to the podium.

1 MJ: Okay, very good. Thanks, Mr. McMillan, for a very fine
2 argument.

3 [Mr. McMillan, civilian defense counsel, resumed his seat at defense
4 table.]

5 [Lieutenant Colonel Britt, prosecutor, prepared to move to the
6 podium.]

7 MJ: [REDACTED], does the interpretation seem to you to be
8 keeping? You look like you have a look of concern on your face and
9 you are looking towards the interpreter booth.

10 DEFENSE INTERPRETER: We thought she was signaling to you, but
11 apparently not.

12 [The military judge looked at the commission interpreter in the booth
13 who made a hand gesture.]

14 MJ: Okay. This [making a "T" with his hands] apparently means
15 the same thing in Yemeni Arabic that it means in a basketball game.
16 I think the interpreter is ready for a break. Do you mind if we
17 interrupt now and take your argument in a few moments?

18 PROS: No, sir, not at all.

19 MJ: Court will be in recess and for about 15 or 20 minutes and
20 reconvene when the interpreter has had a chance to rest her throat.

21 Court's in recess.

22 [The R.M.C. 803 session recessed at 1607 hours, 4 June 2007.]

1 [The R.M.C. 803 session was called to order at 1639 hour, 4 June
2 2007.]

3 MJ: The court is called to order. All parties present when the
4 court recessed are once again present. Colonel Britt, I think we're
5 ready for your argument.

6 PROS: Yes, sir. Thank you, Your Honor.

7 Your Honor, may it please the court. My name is Lieutenant
8 Colonel William Britt and I am honored to represent the government of
9 the United States. As I was listening to Mr. McMillan give his
10 comments to you a moment earlier, I found myself at times nodding my
11 head in approval at his generally broad recitations of the laws that
12 exist in this country. And I found myself agreeing with many of the
13 points that he made. I think as a general rule some of the
14 conclusions that he drew are accurate--some of the observations that
15 he made are, in fact, accurate. I believe that grants of
16 legislation--grants of jurisdictional authority have to be construed
17 strictly. I believe that the Military Commissions process as
18 authorized by the Military Commissions Act of 2006 is, in fact, and
19 does contain delegations and authorizations for granting
20 jurisdiction, and my argument instead of looking and focusing and
21 rebutting those areas of law, I would rather take this time to focus
22 specifically on the facts dealing with Mr. Hamdan and Mr. Hamdan's
23 CSRT and how we got to where we are today.

1 Let me say at the outset I believe the facts of this case
2 in conjunction with the law support a finding of jurisdiction for the
3 Military Commission to try Mr. Hamdan at this time. This process as
4 we know that gave us the Military Commissions Act was not born in
5 isolation. This was a process of many years as a result of the
6 events primarily of 9/11 2001. In this nation and in the months that
7 followed that date, the United States reluctantly went to war. And
8 there were individuals who were captured, and as a result of that
9 capture obviously decisions had to be made by the President of the
10 United States as to how those individuals would be termed, what
11 conditions they would be held under, and what processes would be
12 devised as the President stated to bring those individuals to
13 justice.

14 The first decision that had to be made was will we retain
15 these individuals because they are unlawful enemy combatants, or will
16 we set them free and transfer them back to their native countries.
17 That gave birth to the CSRT process. The CSRT process was not
18 created with the idea that at some point later there would be a
19 Military Commissions Act. The CSRT process was authorized and, in
20 fact, in the implementing order the CSRT process was authorized to
21 make a finding of whether or not an individual was an enemy
22 combatant. Now that particular decision had ramifications and
23 important ramifications, because as I said earlier, it would make a

1 decision as to whether or not the individual would be held for
2 further detention in the status of a detainee or whether he would be
3 transferred back to his native country.

4 As time went along, obviously, and as we review the
5 evolution of the law we see that different--different methods were
6 devised to bring these detainees to justice and one of those was the
7 Executive Order paradigm that *Hamdan* addressed--the Supreme Court
8 case of *Hamdan*. As a result of the observations that were made by
9 the various justices in *Hamdan* and after extensive debate and review
10 by various agencies that all provided input into the legislative
11 process giving rise to the Military Commissions Act, a decision was
12 made--and once again, I don't know by who and how, but a decision was
13 made to link at this particular time in this particular war the CSRT
14 process to the Military Commissions Act. We have a number of
15 documents which clearly specify that that is how the procedure is
16 going to take place. And we have in the Military Commissions Act two
17 bases by which jurisdiction can be granted.

18 Section 948a(1)(i) [sic] states, "that a person who is
19 engaged in hostilities or--and this is an important disjunctive--or
20 who has purposefully and materially supported hostilities against the
21 United States or its co-belligerents who is not a lawful enemy
22 combatant including a person who is part of Taliban, al Qaeda, or
23 associated forces." This particular means for proving jurisdiction

1 relies essentially on the CSRT finding. The CSRT finding is made up
2 of two parts.

3 One is a legal determination or it has legal consequences
4 and that under the authorizing order an individual can be declared
5 based on a preponderance of evidence as an "enemy combatant." But
6 there is also a factual part which is contained. Your Honor, I would
7 direct your attention to the--what we would consider to be--or what
8 we will refer to as the "Hamdan declassified CSRT finding" that both
9 parties have essentially agreed will be introduced and argued for
10 purposes of this session. Turning to the Combatant Status Review
11 Tribunal decision report cover sheet--kind of a lengthy description
12 of what the finding is of the CSRT--the document is signed by [REDACTED]
13 [REDACTED], Colonel, United States Army, Tribunal President, "we
14 find that by a preponderance of the evidence Mr. Hamdan was properly
15 designated as an "enemy combatant" as defined in reference C," that
16 being the implementing order that established the CSRT process.
17 Additionally, the tribunal found that the detainee is a member of or
18 is affiliated with al Qaeda as more fully discussed in the
19 enclosures.

20 Now at this particular point we have a finding, number one
21 that Mr. Hamdan is an enemy combatant, and number two we find an
22 affiliation with al Qaeda. Then all that is left is to refer to the
23 facts to complete the definition of what constitutes an unlawful

1 enemy combatant as set out in section 948a(1). That is--and I'm
2 referring to the synopsis of the proceedings, and this would be on a
3 summary of the basis for the tribunal decision--and what's found
4 factually is that the detainee admits he served as a personal driver
5 to Osama bin Laden. Both before and after the attacks of the 11
6 September 2001, he admitted he served as member of UBL's bodyguard
7 detachment, armed himself with a weapon, he admits he was captured by
8 the Northern Alliance Forces in the vicinity of Kandahar in
9 possession of a weapon.

10 Sir, that particular factual finding squares up directly
11 with the language in 948a(1)(i) [sic] which states, "A person who has
12 purposefully and materially supported hostilities against the United
13 States." That's the finding of the CSRT, that's the finding that Mr.
14 Hamdan was an enemy combatant, and that's a factual finding that he
15 purposefully and materially supported hostilities against the United
16 States. Not beyond a reasonable doubt, but the standard is by a
17 preponderance of the evidence pursuant to the CSRT order.

18 Now Congress also provided a second means for determining
19 jurisdiction and that is by establishing (ii) of that same section,
20 "a person who before, on, or after the date of the enactment of the
21 Military Commissions Act of 2006 has been determined to be an
22 unlawful enemy combatant by a Combatant Status Review Tribunal or
23 another competent tribunal established under the authority of the

1 President or the Secretary of Defense." What this particular section
2 envisions is a totally different method for proving jurisdiction.

3 Because the Military Commission Act wasn't born in a
4 vacuum, legislators were certainly aware of the White House
5 determination, dated February 7, 2002, which we've enclosed as an
6 exhibit in our reply brief which states on page 2, paragraph 2d, "I
7 note that because Geneva does not apply to our conflict with al
8 Qaeda, al Qaeda detainees also do not qualify as prisoners of war."
9 So as we move into this determination as to whether or not the
10 Military Commissions has jurisdiction over Mr. Hamdan we are looking
11 at number one, a determination that Mr. Hamdan through the CSRT is in
12 fact an "unlawful combatant." That particular position finds support
13 in Military Commissions Rule number 202 in reference to the
14 *Discussion*.

15 If we look at the *Discussion*, we see--and I'm reading from
16 the part entitled, "Combatant Status Review Tribunal"--"At the time
17 of the enactment of the M.C.A., CSRT regulations provided that an
18 individual should be deemed to be an 'enemy combatant' if he was part
19 of or supporting al Qaeda or the Taliban or associated forces engaged
20 in armed conflict against the United States or its coalition
21 partners." Here is the key point, Your Honor. The United States
22 previously determined that members of al Qaeda and Taliban are
23 unlawful combatants under the Geneva Convention. Previously

1 determined so that when this particular scheme went into effect, we
2 already knew that the President had declared Mr. Hamdan through the
3 CSRT process "unlawful" as an enemy combatant.

4 Now the defense contends that we can't do this. What
5 they've said through their brief is that we are substituting an
6 executive pronouncement for a proper adjudication of status. But
7 that's not what's going on here. What we have in essence is a
8 ratification of that process by the Military Commissions Act. We
9 have legislators that are aware, that fully 3, 4 years earlier the
10 President of the United States had taken this entire class of
11 individuals with links to al Qaeda as determined through the CSRT
12 process and had made a determination that they were unlawful. I
13 would state to the court that it would simply be redundant to make
14 them "unlawful enemy combatants" and I don't believe this scheme
15 requires us to do so.

16 There is an additional feature of the Military Commission
17 Act I'd like to bring to the attention of the court. That is,
18 somewhere during the debate--and the defense can correct me if I'm
19 wrong and Your Honor as well--But it was determined that there needed
20 to be a system in place that could make adjudications not just for
21 this Global War on Terror, not just for this particular set of
22 detainees and defendants, but well into the future. As we look at
23 again the Military Commissions Act and the section that I would refer

1 the court to is section 948d, "Jurisdiction of Military Commissions"
2 (c), it is very interesting the way this is worded. It is worded
3 "determination of unlawful enemy combatant status dispositive." The
4 language of that I hear again and again thrown around in connection
5 with this argument is that the CSRT finding is dispositive. Well,
6 maybe so. But what the language is, is that determination of
7 unlawful enemy combatant status is dispositive. I would say to the
8 court that there is a reason for that and the reason, in essence, is
9 found again in the *Discussion* for Rule 202. And that is reading down
10 to "other competent tribunal" we see the language "the M.C.A. does
11 not require that an individual receive a status determination by a
12 CSRT or other competent tribunal before beginning of a Military
13 Commission proceeding. Why is that? The reason for that is, Your
14 Honor, is that this is one set----

15 MJ: I think you are probably going too fast at this point.

16 PROS: I apologize to the court.

17 MJ: You're very enthusiastic, I understand your passion.

18 PROS: Okay, sir.

19 ----is because this is one set of enemies. If we were to
20 say that there would be a requirement for a CSRT process in every
21 case before we could use the Military Commissions Act, then if
22 individuals in the future were not members of al Qaeda or the

1 Taliban, then we can never use this legislation at all and I don't
2 believe that was the intent of Congress.

3 MJ: What was the Rule you just cited to? Part of the reason I
4 suspected you were going too fast is that I couldn't turn to the page
5 fast enough to keep up.

6 PROS: I apologize. This is Military Commission Rule 202, and
7 it's the *Discussion* at page 214.

8 MJ: Okay.

9 PROS: Now a major part of the defense's concern is that the
10 executive pronouncement has essentially filled into that spot where
11 we would want to find an adjudication of some sort by a tribunal, by
12 a court. And the case which they are citing for that particular
13 proposition is the *Hamdan* case, but I would remind the court that
14 what *Hamdan* essentially was a reaction to was to the executive's
15 entire scheme of trying detainees and not to a designation of a group
16 or members of a group as unlawful combatants.

17 In fact, under *Youngstown Company versus Sawyer*, also known
18 as *Youngstown Steel* in some references at 343 U.S. 579 there's a
19 quote which I think is worth considering. "When the President acts
20 pursuant to an express or implied authorization of Congress, his
21 authority is at its maximum for it includes all that he possesses in
22 his own right plus all that Congress can delegate." We have Congress
23 essentially legislating with a full view, open eyes of that February

1 7, 2002, executive determination and in fact clearly ratified that
2 and incorporated that into the determinative process with regard to
3 whether or not Mr. Hamdan and others like him are "unlawful enemy
4 combatants."

5 **[The prosecutor gathered additional materials from the prosecution**
6 **table and moved them to the podium.]**

7 PROS: Let me take a moment and address just a couple of issues
8 raised by the defense, because I do believe--and I think Mr. McMillan
9 would agree--the focus of our debate has narrowed down essentially at
10 this point anyway to the jurisdictional issues, and the
11 jurisdictional issues as defined through this CSRT process.

12 One of the initial complaints I believe was that the charge
13 sheet was lacking in some regard with regard to jurisdictional
14 language. Once again, we are kind of a creature to the process in
15 the sense that where we have guidance that's the guidance that we
16 follow. Not saying that that guidance can't be right or wrong or
17 otherwise, but in Rule of Military Commission 307 we're told how our
18 charge sheets should look, what kind of language needs to be
19 contained therein. Rule 307, "How to allege offenses." You state
20 that punitive article of the Act--Military Commissions Act, law of
21 war, or offenses defined in the manual. Then the specification is a
22 plain, concise, definite statement of the essential facts
23 constituting the offense as charged. The specification is sufficient

1 if it alleges every element of the charged offense expressly or by
2 necessary implication and, in fact, by reference to the charge sheet
3 which Your Honor has a copy of, that is satisfied to include the
4 predicate jurisdictional language.

5 Let me conclude by addressing the issue of the district
6 court stay and I think that that may have been raised initially in
7 the reply brief--once again, I could be wrong. However, the
8 government is not relying on the Military Commissions Act to argue
9 that that stay is no longer in place. The basis for that stay not
10 being place is United States District Judge James Robertson's order
11 on the *Salim Hamdan versus Donald Rumsfeld* case where the government
12 filed a motion to dismiss the defendant's application for *habeas*
13 relief. That was the same case that the stay was in effect on and
14 the case being dismissed, the stay is also summarily dismissed.

15 Your Honor, I would also--and I believe we stated in the
16 beginning of our briefs, that we each have certain burdens. I think
17 the government bears the burden of persuasion in this matter.
18 Therefore, I would like to reserve 5 minutes or so to address the
19 defense's contentions in surrebuttal.

20 MJ: Okay. Thank you very much.

21 Mr. McMillan reserved 5 minutes to address the
22 constitutional issues. I don't believe the trial counsel reached
23 those; do you, Mr. McMillan?

1 CDC1: I didn't hear them, sir. But I would appreciate the
2 opportunity to address the comments that were made by the prosecutor.

3 MJ: Okay. Well, we'll give you 5 minutes.

4 **[Mr. McMillan, civilian defense counsel, moved from defense table to**
5 **the podium to speak.]**

6 CDC1: Very briefly, Your Honor, what we heard from the
7 government here is an exercise in exactly what the United States
8 Supreme Court indicated should not occur from the lengthy quote that
9 I read from the 1902 Supreme Court case. As I read that to the
10 court, I was concerned that I was taxing the patience of the court
11 with a lengthy quote, but I think it is apparent that my concern that
12 those points be emphasized and underscored was warranted because what
13 has been presented by the government here is a cut and paste job from
14 multiple different documents, multiple different findings, a statute,
15 an administrative--the findings of an administrative hearing, as well
16 as a congressional enactment.

17 The United States Supreme Court said, Chief Justice John
18 Marshall, "The decisions of this court require that averment of
19 jurisdiction shall be positive, that the declaration shall state
20 expressly the fact on which jurisdiction depends. It is not
21 sufficient that jurisdiction may be inferred argumentatively from
22 averments." Thus, picking out stray allegations in the
23 specifications of the charge sheet, wedding them to a February 2002

1 executive fiat which was largely discredited or certainly not
2 embraced by the Supreme Court of the United States in the *Hamdan*
3 decision, and then ignoring the proposition which the prosecutor
4 acknowledged is generally true that jurisdictional statutes be
5 strictly construed, all of these things militate strongly against a
6 finding that jurisdiction based on this CSRT has been properly
7 alleged.

8 I think we have established that the government's position
9 is that its burden of showing jurisdiction relies on the CSRT. So
10 that's progress. I do not think the cut and paste job that the
11 government has engaged in provides a compelling reason for this court
12 to toss aside centuries of jurisprudence and of military law in
13 essentially winging it on the jurisdictional basis for this court
14 proceedings.

15 I would note quickly in passing that no authority has been
16 advanced for the proposition that the District Court injunction which
17 was entered and which per the attachment to our reply brief the
18 government acknowledged was in effect following the Supreme Court
19 decision. No authority has been advanced that that injunction has
20 been invalidated. In fact, if the M.C.A. does anything, it suggests
21 that Congress took notice of the need to make careful distinctions in
22 the M.C.A. between lawful and unlawful combatants in subjecting them

1 to this tribunal, and it did that by drafting in a very deliberate
2 way the jurisdictional provisions of this statute.

3 If there are any questions that the court would like to
4 ask, I would be happy to try my best to answer them.

5 MJ: I think so. I appreciate your offer. If the government
6 wants a few more minutes, I will give them some time before asking
7 the questions.

8 PROS: No response from the government, Your Honor.

9 MJ: Okay, well you we can prepare for questions in a moment
10 then.

11 PROS: Yes, sir.

12 MJ: Let's start with the place you ended. Have you seen the 13
13 December 2006 order of the US District Court for the District of
14 Columbia dismissing the petitioner's *habeas corpus* case?

15 CDC1: Yes, sir.

16 MJ: And your position is that notwithstanding that dismissal
17 the order previously entered remains in effect?

18 CDC1: Precisely correct, sir. Our position is that an
19 injunction entered in the proper exercise of the court's jurisdiction
20 remains in effect until invalidated--until vacated or modified and
21 indeed, sir, we cited a decision of the United States Supreme Court
22 to that effect, the *W.R. Grace* case on page 6 of our reply brief.
23 And I quote, "An injunction issued by a court acting within its

1 jurisdiction must be obeyed until the injunction is vacated or
2 withdrawn." That is a 1983 U.S. Supreme Court case cited in our
3 papers.

4 MJ: So you don't agree then that the District Court's dismissal
5 of the entire action constitutes a vacation or withdrawal of a
6 previously issued order?

7 CDC1: Correct. We do not agree.

8 MJ: Okay. Let me ask you a different question. When the DC
9 court--the DC District Court issued its opinion it wrote in part,
10 "The government must convene a competent tribunal or address a
11 competent tribunal already convened and seek a specific determination
12 as to Hamdan's status under the Geneva Conventions. Until or unless
13 such a tribunal decides otherwise Hamdan has been and must be
14 afforded the full protections of a prisoner of war." In your mind
15 does this suggest a different remedy than dismissal, in other words,
16 reopening of the already convened CSRT and asking them to make or not
17 to make the finding that the Military Commissions Act calls for?

18 CDC1: Your Honor, we believe that the charges referred are
19 invalid and should be dismissed. That would not, of course, prevent
20 the government from complying with the Military Commissions Act in
21 the future on a going forward basis by convening a CSRT or another
22 competent tribunal in the language of the M.C.A. to make the
23 predicate jurisdictional finding of unlawful combatancy.

1 Nevertheless, with respect to the charges in place now they
2 are fatally flawed and should be dismissed because no positive
3 averments of jurisdictional basis are present in them and the cut and
4 paste job is a departure from typical jurisprudence in military
5 courts that this court should not engage in.

6 MJ: You don't believe then that the language in each
7 specification alleging that the accused is an unlawful enemy
8 combatant satisfies the requirement of a positive averment of the
9 basis for jurisdiction?

10 CDC1: That's correct, Your Honor. There are conclusory
11 assertions unsupported by actual averments. There are conclusory
12 assertions at the outset of each charge that Mr. Hamdan, being an
13 unlawful enemy combatant--an alien unlawful enemy combatant is
14 subject to the commission of this jurisdiction. That is inadequate
15 and that's the entire thrust of the Supreme Court case which I just
16 read into the record as well as the *Hamdan* decision which says the
17 circumstances showing jurisdiction must be set forth clearly in order
18 for jurisdiction to exist.

19 MJ: And that is because this is a limited jurisdiction
20 tribunal?

21 CDC1: That is precisely correct.

22 MJ: You understand that in military practice an allegation that
23 the accused is on active duty meets this requirement.

1 CDC1: I understand that.

2 MJ: And why would that kind of allegation not suffice for a
3 Military Commission?

4 CDC1: The mere conclusory assertion that an individual is an
5 unlawful alien enemy combatant is insufficient to make the showing
6 that is the government's burden to make to establish jurisdiction. I
7 think the government itself acknowledges that there needs to be,
8 consistent with the statute, a showing by a CSRT or other competent
9 tribunal that such unlawful--the unlawful predicate has been shown.
10 The government tries to construct that from multiple different
11 findings, documents, administrative holdings. But they do not
12 advance the proper opposition that that conclusory assertion by
13 itself is sufficient and I think they are correct in that.

14 The government also goes to 948(1)(i) [sic] as an
15 alternative basis. There are two definitions for "unlawful
16 combatancy" set forth in the Military Commissions Act. The
17 government turns away from the second of them which provides for the
18 CSRT determination to the first of them, that is, 948(1)(A) [sic]
19 which provides that an unlawful enemy combatant means, "a person who
20 is engaged in hostilities or has purposefully and materially
21 supported hostilities against the United States who is not a lawful
22 enemy combatant" and the point that I need to make here, Your Honor,
23 is that 948a(1) sets forth a series of showings or findings which

1 have not been satisfied, that there is purposeful and material
2 support for hostilities and a showing of not a lawful enemy
3 combatant. The charge sheet does not do that. The CSRT did not
4 address any of those prerequisites for the proper invocation of
5 948a(1)(i) and accordingly, the government's position cannot be saved
6 by invoking that as an alternative basis.

7 MJ: Okay. In your motion you allege that a CSRT is not a
8 properly constituted Article 5 tribunal. What defects do you see in
9 that?

10 CDC1: Your Honor, the Article 5 of the Geneva Convention has
11 been implemented in the American military by regulation AR 190-8
12 which sets out a series of requirements for a properly constituted
13 Article 5 tribunal. I don't have a copy of that at hand. The
14 M.C.A., however, is the governing statute in this instance, and the
15 M.C.A. expressly contemplates the need for a CSRT on the one hand or
16 another competent tribunal on the other hand.

17 It would be our position that the other competent tribunal
18 would need to be a tribunal convened consistent with AR 190-8 and
19 that if it were, it would comply with the Geneva Convention. That
20 would also be consistent with, in our review, the existing injunction
21 from the District Court.

22 MJ: So in your view the CSRT as presently constituted doesn't
23 comply with AR 190-8?

1 CDC1: No, I wouldn't make that position--or make that argument
2 at this point.

3 MJ: Okay.

4 CDC1: I frankly would reserve on that question. I'm not
5 conceding that it does or that it doesn't, but it's just clearly not
6 within the contemplation of Congress, so to speak, to address that
7 fully. It seems to me that what we have in the Military Commissions
8 Act is a CSRT finding or another competent tribunal, presumably
9 another competent tribunal convened in accordance with AR 190-8 would
10 suffice and that's what's being referenced here.

11 MJ: Thank you. Let me just read through my notes again. Thank
12 you, sir. That is all the questions I can think of for you.

13 CDC1: Thank you, Your Honor.

14 **[Mr. McMillan, civilian defense counsel, resumed his seat at defense**
15 **counsel table.]**

16 MJ: Colonel Britt, would you be willing to entertain some
17 questions?

18 PROS: Yes, sir. And I like the way you phrased it. I
19 appreciated that.

20 MJ: Let's see how our interpreter is holding up. **[The military**
21 **judge looked towards the interpreter booth.]** She gives me the thumbs
22 up, I guess we have time for a few questions.

23 **[The prosecutor moved from the prosecution table to the podium.]**

1 MJ: I gather it is your position that the order of the DC
2 District Court is not in effect by virtue of its December 13 order
3 granting dismissal; is that right?

4 PROS: That would be correct, sir. When the underlying case
5 goes away, certainly any allied actions that are connected therewith
6 such as the stay would also disappear.

7 MJ: Do you disagree then with the defense's authority or can
8 you distinguish it?

9 PROS: I would disagree with their application of that authority
10 with that contention, yes, sir.

11 MJ: Okay. As I look at the language in the 14 July 2006 order
12 establishing the CSRTs and in the one dated 2004, I find what is the
13 definition used by the CSRT for determining that the accused was an
14 unlawful--I beg your pardon an "enemy combatant." The second
15 sentence of that paragraph says, "This includes any person who has
16 committed a belligerent act or has directly supported hostilities in
17 aid of enemy armed forces." Are you familiar with the passage I'm
18 citing to?

19 PROS: Yes, sir.

20 MJ: That appears to be a provision that would permit someone
21 who was a lawful combatant and member of the enemy armed forces to be
22 designated an "enemy combatant" by a CSRT tribunal. Do you disagree?

1 PROS: **[Pause.]** That's difficult to say as a theoretical matter
2 because the findings and the language factually, not necessarily
3 legally, don't lend themselves to that conclusion. So I would have
4 to disagree. And that would be the consideration of the CSRT is
5 really doing two things. They are making a finding that has legal
6 implications, and that is, enemy combatant; but they are also making
7 factual findings in conjunction therewith and those findings are
8 tantamount at least in Mr. Hamdan's case because that's the CSRT that
9 we offer to Your Honor. In that particular case that satisfies the
10 definition set out in 948a(1)(i) for a person who has purposefully
11 and materially supported hostilities against the United States.

12 MJ: Who is not a lawful enemy combatant.

13 PROS: And by definition is the finding that he is connected to
14 Taliban, al Qaeda, or associated forces then carries that analysis a
15 step further from which we find he is an unlawful combatant.

16 MJ: I appreciate you raising that point. That's probably the
17 last question I have for you. Are you troubled at all by your
18 assertion that the president can designate an entire class of
19 individuals to be unlawful combatants without respect to their
20 individual participation in hostilities?

21 PROS: I'm not troubled by the fact that the president when
22 faced with an issue which is within his purview to decide--meaning
23 what application of various law will be given these individuals by

1 the armed forces, and I think that would be the qualifier "by the
2 armed forces." Understanding--and I believe we all would agree--that
3 the training which is given our forces is to the common Article 3
4 standard. In light of that, what is significant is only that the
5 designation of these individuals as members of al Qaeda or Taliban or
6 associated forces gets you to the point where you then are
7 essentially determining what kind of treatment they're going to
8 receive, maybe below or above that minimum threshold. So, no, I'm
9 not troubled by that fact.

10 MJ: That probably wasn't the right way to ask the question.
11 Are you troubled by the argument you just made?

12 PROS: I would be a bit more concerned, Your Honor, if for
13 example the president made a designation of a domestic group. Say
14 everybody who was right-handed, something that has no basis in fact,
15 but I think the focus here needs to be the factual basis that these
16 decisions are being made in and designations that we're finding being
17 made that ultimately are being used and essentially sanctioned by
18 later legislative acts. If I could make one more point along those
19 lines.

20 In connection with--and I think counsel had indicated that
21 primarily I was stressing the "little i" basis for jurisdiction and
22 primarily I was because Mr. Hamdan's CSRT satisfies the independent
23 definition of unlawful enemy combatant, but maybe to satisfy that

1 question of (ii) and once again the observation I made earlier about
2 the 948d(c), "Jurisdiction of military commissions, Determination of
3 Unlawful Enemy Combatants Dispositive." The focus seems to be -- and
4 once again this is speculation without any authority, but this seems
5 to mean that a CSRT might, in fact, satisfy the requirement for some
6 other tribunal competent to make those decisions. That's just sort
7 of a footnote--sort of an aside.

8 MJ: Okay. Do you know who wrote the commentary to the rules?

9 **[The prosecutor retrieved a notebook from the prosecution table and**
10 **returned to the podium.]**

11 PROS: Your Honor, I guess I would--like any other person who's
12 going to sit down and read a book--I would immediately turn to the
13 front page. I know that's not a trick question. But it is signed by
14 the SECDEF, Robert Gates. I would assume that--in fact he states
15 that he has consulted with the Attorney General. My assumption would
16 be it would be a combined effort. I have some independent knowledge
17 that it was a combined team effort to produce this document.

18 MJ: Okay. Thank you very much.

19 PROS: Yes, sir.

20 MJ: Okay, gentlemen, ladies. It is 5:30. Would you rather
21 wait around the courthouse while I do my research, even if it might
22 be an hour or more?

23 **[All parties indicated a positive response.]**

1 MJ: Okay. We'll do that. The court's in recess then while I
2 read the law and prepare my ruling on this motion.

3 **[The R.M.C. 803 session recessed at 1728 hours, 4 June 2007.]**

4 **[The R.M.C. 803 session was called to order at 1900 hours, 4 June**
5 **2007.]**

6 MJ: Court is called to order. All parties present when the
7 court last recessed are once again present.

8 My written findings of fact, statement of the law, and
9 discussion and decision will be attached to the record of trial as
10 the next appellate exhibit in order. The parties can get a copy of
11 the entire opinion, if they wish it, from the court reporter after
12 this session of trial. I'll omit the reading of the findings of fact
13 and the summary of law, I think those are pretty well established.
14 I'll just read for you my decision.

15 The government invites the court to find that the 2004
16 determination that the accused is an enemy combatant coupled with the
17 President's 2002 determination that members of al Qaeda or the
18 Taliban are unlawful combatants amount to a finding that the accused
19 is subject to the jurisdiction of this court. The court declines to
20 do so for the following reasons.

21 One, the 2004 CSRT determination that the accused is an
22 enemy combatant was made for the purposes of determining whether or

1 not he was properly detained and not for the purposes of determining
2 whether he was subject to trial by Military Commission.

3 Two, the CSRT finding was made using a different standard
4 than the one that the Military Commissions Act establishes for
5 determining unlawful enemy combatant status. The definition of
6 "enemy combatant" used by the CSRT is less exacting than the
7 definition of "unlawful enemy combatant" prescribed in the M.C.A.
8 The CSRT could have found a civilian not to be an active part in
9 hostilities, but part of or supporting Taliban or al Qaeda forces
10 engaged in hostilities to be enemy combatant. Yet the M.C.A. limits
11 this court's jurisdiction to those who actually engaged in
12 hostilities or who purposefully and materially supported hostilities.
13 The CSRT did not apply this definition and this finding, therefore,
14 does not support the jurisdiction----

15 **[The court interpreter interrupted from the booth.]**

16 COURT INTERPRETER: Excuse me, Your Honor. Could you repeat the
17 last two points, please? You were going a bit too fast for me.
18 Thank you.

19 MJ: Oh. I got caught. And she has no way of signaling me.

20 Okay, the last point was the 2004 CSRT determination that
21 the accused is an enemy combatant was made for the purposes of
22 determining whether or not he was properly detained and not for the

1 purpose of determining whether he was subject to trial by Military
2 Commission.

3 Two, the CSRT finding was made using a different standard
4 than the one the Military Commissions Act establishes for determining
5 unlawful enemy combatant status. The definition of "enemy combatant"
6 used by the 2004 CSRT is less exacting than the definition of
7 "unlawful enemy combatant" prescribed in the M.C.A. The CSRT could
8 have found a civilian not taking part--not taking an active part in
9 hostilities, but part of, or supporting Taliban or al Qaeda forces
10 engaged in hostilities to be an enemy combatant. Yet, the M.C.A.
11 limits this court's jurisdiction to those who actually engaged in
12 hostilities or who purposefully and materially supported hostilities.
13 The CSRT did not apply this definition and its finding, therefore,
14 does not support the jurisdiction of this tribunal.

15 Three, the CSRT finding preceded the M.C.A. by 2 years.
16 The accused's participation in the CSRT may well have been much
17 different had he realized its finding would be used to impose
18 criminal jurisdiction upon him before a Military Commission.

19 Four, the President's determination applied to members of
20 al Qaeda as a group and did not represent an individualized
21 determination that this accused supported or engaged in hostilities.
22 The M.C.A. offers another route to a finding of jurisdiction, a
23 finding by a CSRT before, on, or after the enactment of the M.C.A.

1 that the accused is an alien unlawful enemy combatant. The October
2 2004 CSRT finding was before the enactment of the M.C.A. but it found
3 only that the accused was an enemy combatant.

4 There may well be evidence in the government's possession
5 that could readily support a determination that the accused is
6 subject to the jurisdiction of this Commission. The government may
7 be able to easily demonstrate that jurisdiction by reopening the 2004
8 CSRT or by organizing a different one and directing it to clearly
9 decide the accused's status. He is either entitled to the
10 protections accorded to a prisoner of war, or he is an alien unlawful
11 enemy combatant subject to the jurisdiction of the Military
12 Commission, or he may have some other status.

13 The government having failed to determine by means of a
14 competent tribunal that the accused is an unlawful alien enemy
15 combatant using the definition established by Congress in the M.C.A.
16 is not shown by a preponderance of the evidence that the accused is
17 subject to the jurisdiction of this Commission. The defense motion
18 to dismiss, therefore, the charges and specifications for lack of
19 jurisdiction is granted without prejudice.

20 Anything else from either side before we adjourn?

21 PROS: Your Honor, we will ask, of course, for the obligatory 72
22 hours, please.

23 MJ: You have it, of course.

1 Thank you very much.

2 Commander? I thought I saw you nodding in the negative.

3 DDC: No, nothing else, sir.

4 MJ: Very good. This Military Commission then is adjourned.

5 **[The R.M.C. 803 session recessed at 1907 hours, 4 June 2007.]**

6 **[END OF PAGE]**